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IN THE

SUPREME COURT OF THE UNITED STATES

March Term, 1982

HONDA MOTOR CO., INC.,
Petitioner,

vs.

DANNY WAYNE HAUSCHILD
b/n/f GLENDA CAVINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The jury to which this products liability action was submitted failed to return a verdict. Within ten days after it was discharged, petitioner moved for judgment in accordance with its motion for a directed verdict, whereby it challenged the legal sufficiency of respondent's case. When the District Court entered an order denying this Rule 50(b) motion, petitioner sought to invoke the jurisdiction of the Court of Appeals under 28 U.S.C. § 1291 and 28 U.S.C. § 1651(a). That court, treating the District Court's order, not as the denial of a claimed substantive right, but as a new trial order held that it lacked jurisdiction to entertain an appeal under 28 U.S.C. § 1291. Petitioner's application for a writ of mandamus (i.e., its notice of appeal treated as such, at petitioner's urging) was then summarily denied and the appeal dismissed with the following observation:

> Inasmuch as both parties requested a jury trial and the jury failed to reach a verdict then, absent an intervening final judgment by the court, the case will necessarily be tried again before another jury.

The question presented for review is:

Whether an order denying the relief sought by a Rule 50(b) motion for judgment, filed subsequent to the discharge of a hung jury and raising only issues of law, is a "final decision" within the meaning of 28 U.S.C. § 1291.

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No.

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HONDA MOTOR CO., INC.,
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DANNY WAYNE HAUSCHILD
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the orders (and opinion) of the United States Court of Appeals for the Seventh Circuit entered in this case on December 1, 1981.

ORDERS (AND OPINION) BELOW

Petitioner's appeal to the United States Court of Appeals for the Seventh Circuit was disposed of by two "unpublished orders" issued pursuant to Circuit Rule 35. These orders are

reprinted in the appendix, at 1a - 3a, *infra*. The orders rendered in this case by the United States District Court for the Southern District of Indiana are not reported, but are reprinted in the appendix, at 4a - 8a, *infra*.

JURISDICTION

The date of the orders sought to be reviewed and the date of their entry is December 1, 1981. This petition for writ of certiorari was filed within ninety days of that date, as required by 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND PROCEDURAL RULES INVOLVED

United States Constitution:

Amendment V

United States Code, Title 28:

§ 1291. Final decisions of district courts
§ 2072. Rules of civil procedure

Rules of Civil Procedure for the United States District Courts:

Rule 1. Scope of rules

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict

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STATEMENT OF THE CASE

This is a products liability action wherein compensatory damages are sought against the manufacturer of a three wheel recreational vehicle for injuries sustained by a ten year old rider.

Basis for Federal Jurisdiction

The subject matter jurisdiction of the United States District Court for the Southern District of Indiana was invoked under 28 U.S.C. § 1332. Respondent Danny Hauschild (hereinafter "Hauschild") is a citizen of Indiana; petitioner Honda Motor Company, Ltd. (hereinafter "Honda"), a corporate citizen of Japan with its principal place of business in New York; and the amount in controversy, in excess of $10,000.00.

Facts Material to Consideration of the Questions Presented

This case proceeded to trial before a jury on November 10, 1980.[1] At the close of Hauschild's evidence, Honda filed a motion for a directed verdict. After the District Court denied this motion, Honda put on its evidence. At the close of all the evidence, petitioner moved a second time for a directed verdict.

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1. Although each of the parties demanded trial by jury in the manner provided in Rule 38, the language of their respective demands differed:

> THE PLAINTIFF RESPECTFULLY REQUESTS TRIAL BY JURY.
>
> The defendant, Honda Motor Co., Ltd., respectfully requests a trial by jury on all issues of fact properly triable to a jury in the captioned cause.

This motion, like the first, was denied and the case submitted to the jury on November 14, 1980, on the theory of strict liability in tort. Later that day, the District Court discharged the jury upon determining that it was unable to agree upon a verdict and declared a mistrial.

Within ten days after the jury was discharged, Honda filed a motion for judgment in accordance with its motion for a directed verdict made at the close of all the evidence, pursuant to Rule 50(b). A motion for new trial was not joined with this motion, nor was a new trial prayed for in the alternative. On January 23, 1981, the District Court entered its order denying Honda's motion for judgment. That order makes no reference to a new trial, nor does it specify any grounds therefor.[2]

It was from the District Court's order of January 23, 1981, that Honda appealed to the Court of Appeals for the Seventh Circuit. This appeal was premised on 28 U.S.C. § 1291 and presented for review a single legal issue:

> Whether there was sufficient evidence to submit a products liability case to the jury (1) where plaintiff sought to prove the existence of a defect in the product by circumstantial evidence, but failed to introduce evidence tending to negate causes for his accident other than the alleged defect and (2) where plaintiff contended that the manufacturer's instructions and warnings were inadequate, but failed to offer proof of the plaintiff's using the product in accordance with those instructions and warnings at the time of the accident or of the warnings' being incomprehensible to the average user of the product or

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2. Hauschild, as appellee, did not assert grounds entitling him to a new trial in the event the Court of Appeals concluded that the District Court erred in denying petitioner's motion for judgment. *See* Fed. R. Civ. P. 50(d).

> of their failing to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.

Brief and Appendix of Defendant-Appellant Honda Motor Co., Ltd., at 1-2.

The question of whether the challenged order came within the Seventh Circuit's appellate jurisdiction was raised by the court on its own motion during argument on the merits, after which both parties were afforded the opportunity to brief this issue. The principal argument mounted in Honda's jurisdictional brief was stated in the following terms:

> Because the order appealed from represents a final rejection of an asserted right the legal and practical value of which would be destroyed unless immediate appeal is permitted, it should be treated as "final" for the purposes of 28 U.S.C. § 1291.

That found in Hauschild's brief regarding jurisdiction:

> There are cases "which finally determine claims of right separate from and collateral to the rights asserted in the action, too important to be denied review and too independent of the causes [*sic*] itself to require that appellant [*sic*] consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S.Ct. 1221, 93 Law Ed. 1528.
>
> The issue that the Appellant attempts to raise herein is not an independent, collateral issue but rather the subject matter of the lawsuit itself:
>
> > Plaintiff failed to prove an essential element of his claim: the existence of a defect

in the ATC 90. Appellant's Brief, p. 12

> Such an issue will indeed be a part of the second trial and undoubtedly be merged in a final judgment.

Following submission of the parties' briefs on the issue of jurisdiction, the court disposed of Honda's appeal by an "unpublished order,"[3] wherein it held that the order appealed from was not "final" and, therefore, not appealable as of right under 28 U.S.C. § 1291. The Court of Appeals explained the reasons for its decision in the following manner:

> Inasmuch as both parties requested a jury trial and the jury failed to reach a verdict then, absent an intervening final judgment by the court, the case will necessarily be tried again before another jury. Therefore the effect of the trial court's denial of the motion for judgment under Rule 50 (b) was to permit a new trial. Ordinarily the granting of a new trial is not appealable. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 254 (1940). That rule is applicable here. Professor Moore notes:
>
> > It has been held, therefore, that an order granting a new trial is not appealable and that an order denying a motion for judgment after a jury has disagreed and has been discharged is also not appealable.
>
> 5A Moore's Federal Practice para. 50.16 at 50-130.

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3. Inherent in the panel's disposition of this appeal by "unpublished order," rather than by "published opinion" is the determination that its decision did not constitute "a significant and non-duplicative contribution to legal literature . . . by resolving or creating a conflict in the law." *See* 7th Cir. R. 35(c) (1) (iv) (C). ***But see Basciano v. Reinecke***, 313 F.2d 542 (2d Cir. 1963).

Having concluded that the challenged order was not appealable and that it lacked jurisdiction to entertain an appeal, the court treated Honda's notice of appeal as an application for a writ of mandamus, as Honda had urged it to do in its jurisdictional brief.[4] So treating it, the court denied Honda's application and dismissed the appeal.

REASONS FOR ALLOWANCE OF THE WRIT

1. In General

By deciding this case as it did, the United States Court of Appeals for the Seventh Circuit took a position at odds with that taken by the Second Circuit almost twenty years ago. *Compare Hauschild v. Honda Co., Ltd.*, appendix at 2a-3a, *infra, with Basciano v. Reinecke*, 313 F.2d 542 (2d Cir. 1963) (by implication) (Court of Appeals may review the correctness

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4. Honda's position on this issue is summarized in the concluding paragraph of its jurisdictional brief:

> The order denying Honda's motion for judgment is a complete, formal and, in the District Court, a final rejection of its claim that it is entitled to judgment as a matter of law and, as such, constitutes a final decision, appealable under 28 U.S.C. § 1291. Should this court of review find to the contrary, Honda will then have satisfied the first prong of the test enunciated in *Allied Chemical Corporation v. Daiflon, Inc.* [449 U.S. 33 (1980)], – it would have no other adequate means to attain the relief it desires. At that point in time, Honda will become a proper party to seek the issuance of a writ of mandamus directing the District Court Judge to vacate the order denying Honda's motion for judgment and to enter judgment in accordance with that motion.

of a District Court's denial of defendant's motion for judgment under Rule 50(b). By disposing of the appeal as it did, by "unpublished order," the Seventh Circuit announced sub silentio that its decision did not

> (i) [establish] a new, or [change] an existing rule of law;
>
> (ii) [involve] an issue of continuing public interest;
>
> (iii) [criticize] or [question] an existing rule of law;
>
> (iv) [constitute] a significant and non-duplicative contribution to legal literature
>
> (A) by a historical review of law,
> (B) by describing legislative history, or
> (C) by resolving or creating a conflict in the law;

7th Cir. R. 35 (c) (1) (criteria for publication). Whether that is so is the question put to this Court by this petition for writ of certiorari.

This case raises novel and important questions of federal law which have not, but should be, settled by this Court. These questions touch not only the jurisdiction of the United States Courts of Appeals, but also the interrelationship of certain procedural rules prescribed by this Court under the enabling act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072), namely, Rules 1, 50, 54 and 59 of the Federal Rules of Civil Procedure.

More than proper practice under Rule 50(b) is drawn into issue here. The constitutionality of that rule, as applied by the Seventh Circuit in this case, is questioned, not in terms of the right to a jury trial assured litigants in state and federal courts by the Seventh Amendment, but in terms of equal protection rights assured litigants in the federal courts by the Due Process Clause of the Fifth Amendment (and rights assured state court litigants by the Equal Protection Clause of the Fourteenth Amendment).

The inquiry extends beyond constitutional guarantees to substantive rights grounded in statute and common law alike and ends with the question which calls for the exercise of this Court's supervisory and rule-making powers: whether the Seventh Circuit's interpretation and application of Rule 50 "abridge[s], enlarge[s] or modif[ies] any substantive right," in contravention of the plain language of the act authorizing its adoption, 28 U.S.C. § 2072.

2. *The Seventh Circuit's decision that it lacks jurisdiction under 28 U.S.C. § 1291 to entertain an appeal from the District Court's order denying petitioner's timely filed Rule 50(b) motion is in conflict with the Second Circuit's decision in Basciano v. Reinecke.*

The Second Circuit, in a decision rendered almost twenty years ago and to this date not questioned in any reported decision, held that the correctness of the District Court's ruling at the end of the first trial denying defendant's motion for judgment under Rule 50(b) is not reviewable on appeal from the judgment in a second trial of the same cause. *Basciano v. Reinecke*, 313 F.2d 542, 542 (2d Cir. 1963). Implicit in this holding and the balance of the court's opinion is its conclusion that an order denying a motion for judgment challenging the legal sufficiency of plaintiff's case is subject to immediate review on appeal.

Except for the timing of Reinecke's appeal and his proceeding with a second trial of Basciano's personal injury claim without registering his objection to the sufficiency of plaintiff's case at the first trial with the Second Circuit, Reinecke and Honda proceeded down the same path, that chartered by Rule 50(b). Each encountered the same obstacles along the way. Their respective motions for directed verdict were filed at the close of all the evidence and subsequently denied. After the New York and Indiana juries reported to Judge Abruzzo and Judge Brooks that they were unable to reach a verdict, their discharge was followed by the filing of motions for judgment. Upon denial of its motion,

Honda filed its notice of appeal. Reinecke did not; instead he "proceed[ed] in the second trial, permitted the plaintiff to prove an adequate case and thereby waived objection to the plaintiff's case presented at the first trial." 313 F.2d at 544.

The Second Circuit analogized Reinecke's proceeding with the second trial to the situation where a defendant puts on his case after denial of his motion for directed verdict at the close of plaintiff's case. Having pursued that course, the movant is deemed to have waived his right to a directed verdict and may not thereafter challenge the correctness of the court's ruling on that motion on appeal from an adverse judgment.[5]

Because the Seventh Circuit did not question or criticize the Second Circuit's holding in *Basciano v. Reinecke,* can it be said that there is, in fact, a conflict between the circuits? If the standard to be applied in making that determination is that the decisions involve "the same matter," Sup. Ct. R. 17.1(a), the answer turns upon the meaning of "matter." If this Court looks to the holdings of the Second and Seventh Circuits, the decisions appear to have nothing in common;

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5. Cited as authority for this proposition by the Second Circuit was *Bogk v. Gassert,* 149 U.S. 17, 23 (1893), wherein this Court wrote:

> The practice in Montana (Comp. St. § 242) permits a judgment of nonsuit to be entered "by the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of error, if it be refused; but he has no right to insist upon his exception after having subsequently put in his testimony . . . .

one court holds that a ruling denying defendant's motion for judgment under Rule 50(b), challenging the adequacy of plaintiff's case, is subject to immediate review on appeal from that ruling; the other, that the granting of a new trial order is ordinarily not appealable. If, however, the focal point of the Court's inquiry is the decision appealed from, the right asserted by the appellant, and the issues presented for review by the litigants, that conflict is apparent.

To find that a conflict did not exist would be to find that the Seventh Circuit, by dismissing Honda's appeal, refused to exercise its statutorily prescribed jurisdiction and justify this Court's issuance of a writ of mandamus. *Cf. Thermtron Prod. Corp. v. Hermansdorfer*, 423 U.S. 336 (1976) (refusal to exercise jurisdiction under 28 U.S.C. § 1447).

3. *Novel and important questions of federal law which have not, but should be, settled by this Court are presented by the Seventh Circuit's decision in this case. Central to each of these questions are the substantive rights assured petitioner under Indiana law and whether, by its construction of 28 U.S.C. § 1291 and Rule 50(b), the court of appeals has abridged those rights and enlarged petitioner's.*

The principal procedural question presented in this case is whether an order denying the relief sought by a Rule 50(b) motion for judgment challenging the legal sufficiency of plaintiff's case is a "final decision" within the meaning of 28 U.S.C. § 1291 and, therefore, appealable as of right.[6]

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6. It goes without saying that a defendant whose Rule 50(b) motion for judgment notwithstanding the verdict is denied may have the propriety of that ruling reviewed on appeal. The appeal is said to be taken, not from the order denying his motion, but from the judgment entered on the verdict. *E.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 253-54 (1940). That the right of review on appeal is not insubstantial was recognized by this Court in *Neely v. Martin K. Eby Con-*

In its motion for judgment and on appeal, petitioner raised questions of "dispositive issues of law which, if resolved in [its] favor, must necessarily terminate the litigation," *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 327 (1967), on the merits and result in the entry of a final judgment adjudicating respondent's products liability claim and the rights and liabilities of petitioner and respondent alike.

The decision appealed from is clearly not separate and independent from the merits of respondent's cause of action.[7]

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struction Company, where note was taken of the number of cases in which the courts of appeals had reversed denials of such motions and directed entry of judgment notwithstanding the verdict. 386 U.S. 317, 326 n.5 (1967).

7. Rule 54(b), although not applicable to this single claim case, speaks of "any order or other form of decision, however designated, which adjudicates . . . the claims or the rights and liabilities of . . . the parties."

So, too, did this Court speak in terms of adjudicating the claims of the parties in its decision in *United States v. Irwin*, 127 U.S. 125, 129 (1888):

> "An act referring to the court of claims the claims for property seized by General Johnston on the Utah expedition for examination and report," sufficiently indicates the intention of congress that the conclusions of the court of claims should not be final, but subject to revision, at the discretion of congress. But, in our opinion, the controlling words of the act are those which declare that *the claims of the parties are thereby referred to the court of claims "for adjudication according to law." The force of this phrase cannot be satisfied by anything less than a formal, regular, and final judgment of the judicial tribunal to which the matter is submitted, acting upon the acknowledged principles of law applicable to the circumstances of the case.* All such

Consequently, it does not fall within the "collateral order" doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). However, that fact did not justify the Seventh Circuit's ending its inquiry into whether the order denying petitioner's motion for judgment came within its § 1291 jurisdiction or warrant its treating the lower court's decision as the functional equivalent of a decision granting a new trial,[8] unappealable under § 1291.

> judgments were required by existing law to be reported to congress; and the addition of words to the same effect in this statute, while being perhaps unnecessary, does not change the character of the judgments to be reported.

(Emphasis supplied).

The District Court's decision on petitioner's motion for judgment constituted an adjudication according to law of petitioner's products liability claim and the rights and liabilities of petitioner and respondent alike, and was, therefore, a "final decision" within the meaning of 28 U.S.C. § 1291 and a "judgment" within the meaning of Rule 54(a). Because the order does, in fact, adjudicate all the claims and rights and liabilities of the parties, it is not "subject to revision," Fed. R. Civ. P. 54(b).

8. Did the court reach this result by concluding that under the circumstances presented and the plain language of Rule 50(b) the District Court had two options open to it–"to direct the entry of judgment as if the requested verdict had been directed or . . . order a new trial"–and that its failure to exercise one was tantamount to its exercising the other? Regardless of the reasons underlying its decision to treat the order appealed from as a new trial order, one thing is certain: by employing this fiction, the court of appeals declined to assume jurisdiction over an appeal from an order which has yet to be entered of record.

Does Rule 50(b) contemplate a district court's entering an order for a new trial on its own initiative, as the Seventh

Two of *Cohen's* tests can be applied with equal force to judicial decisions involving asserted rights, whether collateral or not, for the purpose of determining their appealability under 28 U.S.C. § 1291: (1) whether the District Court's action was fully consummated, its decision final in the sense that it was not "tentative, informal or incomplete" before the appeal was taken, nor "subject to reconsideration from time to time," and (2) whether the court's decision concerned a claim of right "too important to be denied review," yet one which could not effectively be reviewed on appeal from a final judgment. 337 U.S. at 546-47. *Accord, Abney v. United States,* 431 U.S. 651, 659 (1977) (appeal permitted from pretrial order denying criminal defendant's motion to dismiss indictment on double jeopardy grounds); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 172, (1974) (District Court's order "conclusively reject[ing] respondents' contention that they could not lawfully be required to bear the expense of notice to the members of petitioner's proposed class" appealable under § 1291, inasmuch as it was a final disposition of a claimed right); *Stack v. Boyle,* 342 U.S. I (1957) (appeal permitted in advance of trial where defendant asserted a violation of his constitutional right to bail); *cf. Bradley v. School Board,* 416 U.S. 696, 724 n.28, (1974) (construing statute providing for award of attorney's fees in school desegregation cases "[u]pon the entry of a final order by a court of the United States") ("[T]he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of [such] fees.").

a. *Because the order denying Honda's motion for judgment represents a final rejection of*

Circuit seems to suggest, or does it merely contemplate the court's ruling on a motion for a new trial, if any, which is joined with a verdict loser's motion for judgment notwithstanding the verdict? If the latter, would not that motion and any order granting a new trial have to comply with the provisions of Rule 59 and Rule 50(c) mandating the specification of the grounds therefor?

an asserted right the legal and practical value of which would be destroyed unless immediate appeal is permitted, is it appealable under 28 U.S.C. § 1291?

The power of the federal courts to direct a verdict for insufficiency of evidence was recognized by this Court for almost a century before the practice was explicitly approved in the promulgation of Rule 50 of the Federal Rules of Civil Procedure. *Galloway v. United States*, 319 U.S. 372 (1943). Therefore, where the plaintiff has failed to make a prima facie case and the defendant has filed timely motions for a directed verdict and for judgment, pursuant to Rule 50(b), the defendant is entitled, as a matter of substantive law, to the entry of judgment as if the requested verdict had been directed.

Here, as in *Abney v. United States*, the challenged order constitutes "a complete, formal and, in the trial court, a final rejection" of a claimed right. The matter remained open, unfinished and inconclusive between November 14, 1980, the date on which the case was submitted to the jury, and January 23, 1981. However, with the entry of the District Court's decision on the latter date, the matter became ripe for review and subject to correction by the Court of Appeals. *See Basciano v. Reinecke*, 313 F.2d 542 (2d Cir. 1963).

b. *Are the substantive rights of the parties abridged, enlarged or modified by construing 28 U.S.C. § 1291 and Rule 50 so as to preclude immediate review of the denial of a timely filed motion for judgment which raises dispositive issues of law?*

The enabling act under which Rule 50 was promulgated states in clear and unequivocal terms that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U.S.C. § 2072.

It has long since been decided that Rule 50 does not offend the Seventh Amendment. *See Galloway v. United States*, 319 U.S. 372 (1943). This case squarely presents the remaining question to be decided–whether the substantive rights of the parties are abridged, enlarged or modified by construing 28 U.S.C. § 1291 and Rule 50 so as to preclude immediate review of the denial of a timely filed motion for judgment which raises dispositive issues of law and give the plaintiff a second "chance, by education gained at the opposing party's expense, for perfecting a case" at another trial, *Galloway v. United States*, 319 U.S. at 393. *Id.* (defendant has the right to challenge the legal sufficiency of the opposing case); *Butler Bros. v. Mc Colgan*, 315 U.S. 501, 510 (1942) (due process does not contemplate giving a party a second day in court after he has had a full opportunity to be heard on the issues he tendered).

c. *Are the equal protection rights assured petitioner by the Due Process Clause of the Fifth Amendment violated by construing 28 U.S.C. § 1291 and Rule 50 so as to preclude immediate review of the denial of a timely filed motion for judgment which raises dispositive issues of law?*

That there is an equal protection component of the Fifth Amendment is no longer questioned. *See Califano v. Westcott*, 443 U.S. 76 (1979). *Accord, Califano v. Goldfarb*, 430 U.S. 199 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Of the questions presented by the court of appeals' decision in this case, the most significant is whether petitioner's equal protection rights as a federal court litigant have been violated by the Seventh Circuit's construction and application of § 1291 and Rule 50. The body of law encompassed by those two provisions is, on its face, evenhanded. *Cf. United States v. Antelope*, 430 U.S. 641, 647-49 (1977) (no violation of equal protection where "Indians indicted under the Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction"). Its application by the

Court of Appeals, however, is not. That there has been a "final decision" –an adjudication according to law by a court of competent jurisdiction of the parties' rights and liabilities under applicable law, not *what* that decision is, should be determinative.

Where, as here, there is differential treatment of similiarly situated litigants, the next question to be asked and answered is whether it can be justified on the grounds of administrative convenience? *See Frontiero v. Richardson, supra,* 411 U.S. at 688-91. *Cf. Reed v. Reed,* 404 U.S. 71 (1971) (statutory scheme designed to reduce workload on probate courts by eliminating one class of contests violated Fourteenth Amendment's Equal Protection Clause).

4. *Effective administration of the federal courts calls for immediate review of Rule 50(b) motions challenging the legal sufficiency of the opposing case and clarification of this point by this Court.*

In *Montgomery Ward & Company v. Duncan,* this Court held that "the courts should so administer [Rule 50] as to accomplish all that is permissible under its terms". 311 U.S. at 253.

By deciding, on appeal, those questions of law presented by a Rule 50 motion for judgment which has been denied following discharge of the jury,[9] the recognized purpose of that

9. The function of motions for directed verdict and for judgment is to test the legal sufficiency of the evidence before the case is submitted to the jury. Such motions raise a question of law. *See, e.g., Appleman v. United States,* 338 F.2d 729, 730 (7th Cir. 1964); *Lescher Bldg. Serv., Inc. v. Local No. 133 of the Sheet Metal Workers Internat'l Assn.* 310 F.2d 331, 333 (7th Cir. 1962); *Panter v. Marshall Field & Co.* 486 F. Supp. 1168, 1184-85 (N.D.Ill. 1980) ("Whether, in this case, a verdict should be directed is determined by the law that controls the controversy between the parties, law

rule – "to speed litigation and to avoid unnecessary retrials, *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. at 298, would be better served and scarce judicial resources preserved.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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---

which this court would instruct the jury it must follow if asked to deliberate and reach a verdict"), *aff'd*, 646 F.2d 271 (7th Cir.1981). Motions for a directed verdict and for judgment, unlike certain motions for a new trial, do not raise questions which invoke the discretionary powers of the trial court. *Compare Panter v. Marshall Field & Co., supra,* with *Allied Chemical Corp. v. Daiflon, Inc., supra,* (motion for new trial), and *Bazile v. Bisso Marine Co.*, 606 F.2d 101, 105, (5th Cir. 1979) (motion for new trial).

10. The following information is provided per Supreme Court Rule 28.1: Honda Motor Co., Ltd. and Honda of America, Inc.

Appendix

Unpublished Per Curiam Order

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 1, 1981

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 81-1158

DANNY WAYNE HAUSCHILD b/n/f GLENDA CAVINS, *Plaintiff-Appellee,*	) Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
vs.	)
HONDA MOTOR CO., LTD., *Defendant-Appellant.*	) No. 78 C 160) Gene E. Brooks, Judge

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that this appeal is DISMISSED, with costs, in accordance with the order of this Court entered this date.

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued November 3, 1981
Decided December 1, 1981

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 81-1158

DANNY WAYNE HAUSCHILD b/n/f GLENDA CAVINS,	) Appeal from the United
Plaintiff-Appellee,	) States District Court for
	) the Southern District of
	) Indiana, Evansville Divi-
vs.	) sion.
	)
HONDA MOTOR CO., LTD.,	) No. 78 C 160
Defendant-Appellant.	) Gene E. Brooks, Judge.

O R D E R

This appeal arises out of a diversity products liability action wherein damages are sought against the manufacturer of a three-wheel recreational vehicle for injuries sustained by a ten-year old boy. Both parties requested a jury. The cause proceeded to trial before a six-person jury, during the course of which the trial court overruled the defendant's motions for a directed verdict at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence.

The jury was unable to agree upon a verdict, whereupon the court declared a mistrial and discharged the jury. The defendant then filed a motion for judgment under Federal Rule of Civil Procedure 50(b) which provides in part that "[i]f no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." If the defendant's motion had been granted, a final judgment would have been entered for the defendant, and the plaintiff would have been entitled to appeal that judgment. Fed. R. App. P. 4(a)(4). Instead of that, the court denied the defendant's motion for judgment and the defendant appeals. The question of appellate jurisdiction arose for the first time at oral argument, whereupon we gave both parties the opportunity to brief that question, which they have done.

Inasmuch as both parties requested a jury trial and the jury failed to reach a verdict then, absent an intervening final judgment by the court, the case will necessarily be tried again before another jury. Therefore the effect of the trial court's denial of the motion for judgment under Rule 50(b) was to permit a new trial. Ordinarily the granting of a new trial is not appealable. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 254 (1940). That rule is applicable here. Professor Moore notes:

> It has been held, therefore, that an order granting a new trial is not appealable and that an order denying a motion for judgment after a jury has disagreed and has been discharged is also not appealable.

5A Moore's Federal Practice Para. 50.16 at 50-130.

We conclude that the order appealed from is not a final, appealable order and that we lack jurisdiction to entertain an appeal.

The defendant has urged us to treat its notice of appeal as an application for a writ of mandamus. So considering it, we deny the application.

The appeal is DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DANNY WAYNE HAUSCHILD b/n/f GLENDA CAVINS	)	
	)	
vs.	)	**CAUSE NO. EV 78-160-C**
	)	
HONDA MOTOR CO., LTD.	)	

ORDER

This cause comes before the Court on Defendant's Motion for Judgment. The Court, having considered said motion, the response thereto and all other relevant circumstances and now being duly advised in the premises hereby DENIES said motion. The Court finds the reasoning behind its denial of Defendant's motion for directed verdict applicable to this motion.

IT IS SO ORDERED.

DATED at Evansville, Indiana this 23rd day of January, 1981.

/S/ GENE E. BROOKS

Gene E. Brooks, *Judge*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DANNY WAYNE HAUSCHILD	)	
b/n/f	)	
GLENDA CAVINS	)	
	)	EV 78-160-C
v.	)	
	)	
HONDA MOTOR CO., LTD.	)	

ENTRY FOR NOVEMBER 14, 1980

Come again the parties by their respective counsel and the trial of this cause is resumed.

Evidence on behalf of defendant is commenced and concluded. Defendant rests.

Out of the presence of the jury, defendant files motion for directed verdict. Court overrules motion.

Final arguments made.

Court instructs jury.

Jury retires to the jury room for deliberations in charge of a deputy U.S. Marshal and bailiff, duly sworn.

Comes now the jury into open court and advises the Court that they are unable to agree upon a verdict, whereupon the Court declares a mistrial and discharges the jury from further consideration hereof.

Court is now adjourned.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DANNY WAYNE HAUSCHILD	)	
b/n/f GLENDA CAVINS	)	
	)	
vs	)	**CAUSE NO. EV 78-160-C**
	)	
HONDA MOTOR CO., LTD.	)	

ORDER
(Recorded and Transcribed)

GENE E. BROOKS, *Judge:* The Court overrules the Motion for a Directed Verdict in this case for the reason that the defendant's two additional witnesses, had nothing additional to warrant the granting of the motion. The Court has already given the reason the Court has denied the motion.

November 14, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DANNY WAYNE HAUSCHILD b/n/f GLENDA CAVINS	)	
vs	)	CAUSE NO. EV 78-160-C
HONDA MOTOR CO., LTD.	)	

ORDER
(Recorded and Transcribed)

GENE E. BROOKS, *Judge:* The Court, after a Motion for a Directed Verdict, filed by the defendant herein makes the following ruling. Cognizant of the fact that the Directed Verdict is a remedy which should be used cautiously and sparingly; but certainly in a given situation must not be reluctant to do so. The Court by law is required to view the evidence most favorable to the party against whom the motion is directed and give all reasonable inferences to the party against whom it is directed; the thrust being and the purpose being is reluctant to take any question away from the jury, overrules the motion and makes the following comments:

(1) The question as to whether or not the warning was adequate is a question of fact for the Jury, the adequacy of that warning as whether or not it may be, in fact, be inadequate for the Jury's determination. Citing the Indiana case where the *American Optical Company vs. Weidenhamer,* 404 North Eastern Reporter 2d, 606 - the question of no alternative design which existed and which would have prevented the injury in question; it was the Court's determination that this in and of itself, the fact there is no design within the industry, is not fully determinative, and it could be that the entire industry is

behind and does not have an alternative design available. I think the evidence in this case is that the design was simple and the defendant should not be relieved from the measure that he seeks here because no one else in the industry had it. I think there is substantial evidence that the cost, while no exact figure was given, by the nature of the design, put on the improvement on the machine. It was probably low in cost and practical, in that it could be mounted in a few moments, and certainly, technology required to make it pretty much substantial. I think he testified it was made out of regular pipe, tubing and nuts and bolts. I think the evidence is substantial that the product design is incapable of preventing the injury complained of; the fact, that he did have an injury of this kind and it did happen and it does tip. The question as to whether or not there is a better method and whether or not the method suggested by the plaintiff for the improvement is better or not; the rear bumper – is an argument that Counsel for the defendant can argue to the Jury, and in the *Collins* case where it listed, I think nine (9) factors that could be taken into consideration, the Court views that as not being in itself, being all inclusive in the manufacture. In fact, the Court does not go into what weight and importance that any one of these nine (9) factors may have in determining whether or not you, in fact, have a design defect. Motion is denied by the Court.

November 12, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DANNY WAYNE HAUSCHILD b/n/f GLENDA CAVINS	)	
-vs-	)	**NO. EV 78-160-C**
HONDA MOTOR CO., LTD.	)	

MOTION FOR JUDGMENT

The defendant, Honda Motor Co., Ltd., by counsel, pursuant to Rule 50(b) of the Federal Rules of Procedure, moves the Court for judgment in accordance with its motion for a directed verdict filed in this cause at the conclusion of all of the evidence for each of the reasons, separately and severally, set forth in said motion, a copy of which is attached hereto as Exhibit A. Defendant would further show unto the Court:

1. That its motion for directed verdict made at the close of all of the evidence was made and filed with this Court on November 14, 1980.

2. That this Court, upon determining that the jury could not reach a verdict in this cause, discharged the jury on November 14, 1980.

3. That this Motion For Judgment is timely within the provisions of Rule 50(b) of the Federal Rules of Procedure.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DANNY WAYNE HAUSCHILD b/n/f GLENDA CAVINS	)	
	)	
vs.	)	**NO. EV 78-160-C**
	)	
HONDA MOTOR CO., LTD.	)	

MOTION FOR A DIRECTED VERDICT

The defendant, Honda Motor Co., Ltd., moves the court, pursuant to Rule 50 of the Federal Rules of Civil Procedure, for a directed verdict, at the conclusion of all of the evidence, for the following separate and several reasons, to-wit:

1. The plaintiff has failed to prove:
   (a) That the ATC 90 was defective;
   (b) That any defect in the product made it unreasonably dangerous;
   (c) That any defective and unreasonably dangerous condition in the product proximately caused the injuries and damages complained of;
   (d) That a reasonable manufacturer would not sell the product if it knew of the risks involved;
   (e) That the product was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product with ordinary knowledge common to the consumer as to its characteristics;

EXHIBIT A

(f) That at the time of the manufacture of the product there was an available alternative design which was safer and practical under the circumstances;

(g) That there was an alternative design which was feasible in terms of economy, cost, effectiveness, practicality and technological possibilities when viewed in the present state of the art.

2. The evidence affirmatively establishes that the defendant provided warnings of the potential risks in the use of the product.
3. The evidence establishes that the plaintiff used the product contrary to warnings given by the defendant and thereby incurred the risk of injury.
4. The evidence establishes that the plaintiff used the product contrary to warnings given by the defendant thereby misusing the product.
5. The plaintiff has failed to prove that the product was defectively designed.

/S/ ROBERT H. HAHN

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United States Constitution:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 28:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United

States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Rules of Civil Procedure for the United States District Courts:

Rule 1 Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . .

initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

Opposition

No. 81-1632

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

March Term, 1982

HONDA MOTOR CO., INC.,
Petitioner,

vs.

DANNY WAYNE HAUSCHILD
b/n/f GLENDA CAVINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 81-1632

IN THE
SUPREME COURT OF THE UNITED STATES

March Term, 1982

HONDA MOTOR CO., INC.
Petitioner

vs.

DANNY WAYNE HAUSCHILD
b/n/f GLENDA CAVINS,
Respondent.

RESPONDENT'S BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent respectfully requests that the Petition for Certiorari be denied.

ORDERS (AND OPINION) BELOW

The orders and opinion below are adequately set forth in the Petition and reprinted in Petitioner's Appendix.

JURISDICTION

The jurisdicational requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION, STATUTES, AND PROCEDURAL RULES INVOLVED

United States Constitution:

Amendment V

United States Code, Title 28:

§ 1291. Final decisions of district courts
§ 2072. Rules of civil procedure

Rules of Civil Procedure for the United States District Courts:

Rule 1. Scope of rules

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict

Rule 54. Judgments; costs

Rule 59. New trials; amendment of judgments

STATEMENT OF THE CASE

The Petition sets forth an adequate statement of the case.

REASONS FOR DENIAL OF THE WRIT

1. In General

An Order denying a Motion for Judgment after a jury has disagreed and has been discharged is not appealable.

The statute granting jurisdiction on appeal reads in part as follows: Title 28 § 1291, Final decisions of district courts.

> The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States. . . .

Since the jury did not reach a decision and the judge has not granted either party a judgment there is no final decision.

This court in *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed. 571 announced:

> Under § 1291, the Court of Appeals are vested with "jurisdiction of appeals from all final decisions of the district courts. . .except when a direct review may be had in the Supreme Court." We have consistently interpreted this language as indicating that a party may not take an appeal under this section until there has been "a decision by the District Court that 'ends litigation on the merits and leaves nothing for the court to do but execute the judgment.' "

This court has recognized a narrow exception to this rule in *Cohen v Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); however, Petitioner specifically declines to attempt to qualify under this exception.

> The decision appealed from is clearly not separate and independent from the merits of respondent's cause of action. Consequently, it does not fall within the "collateral order" doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949) (Petitioner's Brief, pp. 12, 13)

2. The Seventh Circuit's decision that it lacked jurisdiction under 28 U.S. C. § 1291 is not in conflict with the Second Circuit's decision in Basciano v. Reinecke.

Basciano v. Reinecke, 313 F.2d 542 (2d Cir. 1963) merely holds that the denial of a motion for judgment under Rule 50(b) after the first trial which ended with the jury unable to agree upon a verdict cannot be appealed after a second trial. In *Basciano*, *supra* there was no judgment after the first

trial so there could not have been an appeal even after the first trial. This in no way conflicts with the requirement that there be "a decision by the District Court that ends litigation on the merits and leaves nothing for the court to do but execute Judgment." *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed. 571.

Even though the court did dismiss the appeal in *Basciano, supra*, p. 544 the court did note:

> Although under our theory we are not required to examine the merits of the appeal we may note that we find that, in any event, the appeal is wholly without merit.

3. There is nothing novel about the requirement for an appeal that there be a decision that ends litigation on the merits and such a requirement does not abridge or enlarge any rights of the petitioner.

This court has always required finality as a condition for appellate review.

> An order granting a new trial is interlocutory in nature and therefore not immediately appealable.
>
> * * *
>
> It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188 (1980)

3a. Honda was accorded its' right to have the trial court rule on its' Rule 50(b) motion.

Honda did indeed file its' motion under Rule 50(b), and the trial court did consider this motion. In carefully considering Honda's motion the trial court made the following observations:

> I think the evidence is substantial. . . .,
> (Petitioner's Appendix, p. 8a)

With those observations the court denied the motion.

> *3b. Since the only substantive right of a party to appeal is based upon a final decision Honda's rights herein have not been abridged, enlarged or modified.*

Honda has a substantive right to have the trial court rule on its' Rule 50(b) motion, and the trial court found that there was substantial evidence and overruled Honda's motion. Neither Honda nor any other litigant has a right to appeal a ruling of the trial court which is not final.

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversey, set itself against enfeebling judicial administration. *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 541.

> *3c. Since finality is a condition of review, in all cases Honda is being treated equal when its' attempted appeal without finality is dismissed.*

Under the Federal Rules of Civil Procedure there are a multitude of motions that can be filed by any party litigant during the proceedings before the trial court. Most of the time the court's rulings do not result in a "final decision", and

therefore cannot be appealed at that time. The reason for the rule is to avoid:

> . . .the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 541.

Here Honda is being treated the same as all other similarly situated litigants who cannot appeal because there was no final decision.

> *4. Effective administration of federal courts calls for a single appeal following final judgment on the merits.*

This court in *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 673, 66 L.Ed 571 declared:

> The rule also serves the important purpose of promoting efficient judicial administration.

In addition to citing the reasons contained in *Cobbledick v United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940) this court reasoned:

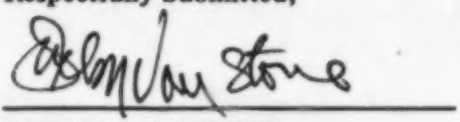
> This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to

decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the District Judge, as well as the special role that individual plays in our judicial system. *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 673, 66 L.Ed 571.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully Submitted,



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